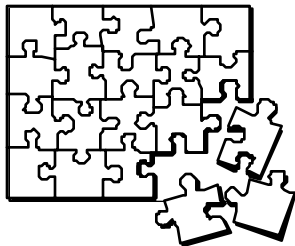


IOWA'S IMPLIED CONSENT LICENSE REVOCATION PROCEDURE

A Manual To Assist Law Enforcement Personnel In Preparing For Effective Enforcement Of Chapter 321J Revocations



**Prepared by the Iowa Department of Justice
Office of the Iowa Attorney General**

July 2003-Second Edition

CONTENTS

About This Manual	Preface
An Overview of OWI and License Revocation in Iowa	Page 1
Preparing for and Testifying at Iowa's Implied Consent Hearing	3
Significant Issues In the OWI Hearing Process	
–Establishing Operation/Investigatory Stop	9
-Accidents	14
–Developing Reasonable Grounds	18
–Field Sobriety Tests	21
–Preliminary Breath Test	24
–OWI Arrest/Statutory Requirements to Proceed With Implied Consent	26
–Implied Consent Advisory	28
–Chemical Tests: Proper Requests, Procedures, and Equipment Use	32
–Chemical Test Refusal	39
–Service of Notice of Revocation	40
–Assistance of Counsel/Rights Under Iowa Code Section 804.20	41
–Zero Tolerance/Alcohol Concentrations Between .02-.10 For Under Age 21 Drivers	45
–Special Requirements for Juveniles	47
–Drivers Under the Influence of Drugs	48
–Commercial Motor Vehicle Operators	50

ABOUT THIS MANUAL

This manual is designed to assist law enforcement personnel in preparing for and participating in Iowa's implied consent license revocation process. It is intended to complement other training manuals and materials which officers may have received from the Iowa Law Enforcement Academy or other academies, county attorneys' offices, or individual law enforcement agencies.

ACKNOWLEDGMENTS

The Department wishes to thank individuals from the office of the Prosecuting Attorneys Training Coordinator, the Iowa Law Enforcement Academy, the Iowa State Patrol, and the Division of Criminalistics Laboratories for information, materials, and input provided for this manual. While these agencies provided assistance, any recommendations within this manual are those of the Department of Justice and may not necessarily reflect the recommendation of any of those agencies.

WHERE TO GO WITH QUESTIONS

There are many resources for peace officers with questions about implied consent and OWI procedures and laws:

Department of Justice, Office of the Attorney General. 515.239.1302. For any questions about this manual or any aspect of the implied consent process.

Department of Transportation, Office of Drivers Services. 515.237.3153. For questions about properly submitting the request and notice (implied consent) form and proper service of the notice.

Iowa Law Enforcement Academy. 515.242.5484. For questions regarding training at the academy, particularly regarding proper administration of field sobriety testing.

County Attorneys Office. Contact your local county attorney's office for information regarding the criminal charges for OWI, any prosecutorial questions, or other procedural matters which the county attorney may have preferences.

Prosecuting Attorneys' Training Coordinator. 515.281.5428. This office assists your county attorney in providing training and materials regarding successful prosecution of OWI cases as

well as other criminal matters.

Division of Criminalistics Laboratory. 515.281.3666. For questions about the use or certification of breath testing devices including the PBT, Data Master cdm, or for the results of chemical testing for alcohol, drugs, or combinations of alcohol and other drugs.

AN OVERVIEW OF OWI AND LICENSE REVOCATION IN IOWA

Operating while impaired is a major public safety issue across the country. Nationally, about 18,000 persons are killed each year because of alcohol-related crashes. Approximately 38.4% of all fatal crashes are alcohol-related.

A 1991 Gallup survey indicated that 14% of the respondents reported to have driven while under the influence of alcohol within the last three months. Another estimate indicates the typical intoxicated driver commits the offense about 80 times per year, or once every four or five nights.

Over the past few decades, the number of drunk driving fatalities and injuries has been declining, largely due to increased education, enforcement, and societal changes; however, the numbers are still substantial.

In Iowa, over 100 persons are killed each year in alcohol-related accidents. Alcohol is involved in one-quarter to one-third of all fatality accidents. Around 2,500 persons are injured in Iowa each year due to alcohol-related accidents.

Like nearly every state, Iowa has a two-track system for persons apprehended for operating while intoxicated (OWI). On the one hand, the person faces a criminal charge of operating while intoxicated, which may include, among other things, jail time, fines, and a criminal record. The criminal charge of OWI is handled by the county attorney's office in whichever of the 99 counties the offense was committed.

Iowa Code Chapter 321J covers matters concerning operating while intoxicated. Under Iowa law, it is unlawful to operate a motor vehicle in this state in any of the following conditions:

1. While under the influence of an alcoholic beverage or other drug or a combination of alcohol and another drug
2. While having an alcohol concentration of .08 or more.
3. While having any amount of a controlled substance in one's body.

In addition to the criminal aspect of OWI, a person arrested for OWI also faces a civil process. This consists of an action by the Iowa Department of Transportation revoking the person's privilege to operate and register motor vehicles. This is referred to as an administrative license revocation because the administrative agency which issues a driver's license (the DOT) is

imposing a revocation of the operator's license.

This matter is handled in the administrative license revocation process. The agency issuing the license (DOT) revokes the operating privilege through evidence supplied by a peace officer who certifies that the person was operating a motor vehicle in violation of Iowa Code section 321J, that the officer had reasonable grounds to believe the offense had been committed, and that the person either refused chemical testing or submitted to a chemical test which indicated an unacceptable level of alcohol and/or drugs.

Implied consent laws assist in removing impaired drivers from the roadways. The law states that any person who operates a motor vehicle anywhere in Iowa in a manner giving reasonable grounds to believe that they are operating in violation of the OWI statute is deemed to have given consent for withdrawal and testing of a specimen to determine the alcohol or drug content in the person's body.

An important difference between the two aspects (criminal and civil) is the burden of proof. The state has the burden of proof in the criminal court system. In the civil or administrative license revocation system, it is the licensee who carries the burden of proof. While the state must prove the person committed the offense of operating while intoxicated in a criminal case, it is the burden of the licensee to, in essence, prove he did not violate the implied consent law in the license revocation process.

Some arrests for OWI may not result in convictions but administrative revocations may still be imposed. Therefore, implied consent laws play an important role in removing impaired drivers from the roadway.

Each year in Iowa, approximately 20,000 persons have their privileges to operate motor vehicles revoked for OWI and another 2,000 persons under age 21 have their licenses revoked for zero tolerance violations. Iowa law also requires the revocation of licenses for persons driving under the influence of illegal drugs and the disqualification of operating privileges for operators of commercial motor vehicles with blood alcohol concentrations of .04 or more.

As peace officers, removing impaired drivers is one of the many critical aspects of protecting the public and ensuring safe roadways. This manual will assist law enforcement officers in ensuring the work done in apprehending impaired drivers results in successful revocation of their privilege to operate motor vehicles, regardless of whether a criminal conviction occurs.

PREPARING FOR AND TESTIFYING AT IOWA'S IMPLIED CONSENT HEARING

Drivers who have their privilege to operate motor vehicles revoked are entitled to request a hearing to determine whether the revocation is proper. The hearing request is handled by the Department of Transportation's Office of Drivers Services. When a request for a hearing is made, that office turns over the hearing request and pertinent information to the Department of Inspections and Appeals' (DIA) Office of Administrative Hearings. DIA administrative law judges (ALJ's) preside over the hearings.

The ALJs' office will send the officer a subpoena commanding you to be present to testify at the administrative hearing. Attached with the subpoena will be instructions on participation.

As soon as possible, please contact the attorney general's office at the telephone numbers provided to indicate that you will be able to participate in the scheduled hearing and provide the telephone number where you can be reached. Please note the hearing on your schedule to ensure you remember to participate. If you fail to appear, it is difficult to win the case.

If you cannot participate at the scheduled time, you need to request a continuance. Continuances are not granted simply to accommodate preferences; you must have a valid conflict which would prevent you from appearing at the scheduled time. Examples of valid continuances include vacation, conflicting court dates, or a training activity. The ALJ will also continue the matter for situations such as a spouse giving birth, funerals, or other unavoidable personal conflicts. Usually the judge will only grant one continuance per side. Therefore, when a future hearing date is determined, please be sure you will be available.

In addition to the subpoena to appear at the hearing, you may be issued a subpoena duces tecum. This subpoena requires you to produce the items listed, to the parties indicated, and by the time frame specified. Sometimes an officer may turn the subpoena over to a records person to obtain the items. While it is fine to have others prepare the items, because the subpoena is issued to the officer, it is ultimately the responsibility of the officer to comply. If you have any questions about complying with the subpoena, contact the attorney general's office at 866.251.5482.

The officer who signs the request for the chemical test portion of the implied consent form is the only officer who will be issued a subpoena. Because that officer must possess the reasonable grounds to have asked for the test, it will be necessary for that person to testify.

Other officers may also have been involved in the case however, only one officer is typically asked to testify, particularly if that officer knows all of the facts another officer would testify about.

In some situations, we may want a second officer to verify certain facts. For instance, a situation involving a motor vehicle accident where one officer handles the scene and another only goes to the hospital may require both officers. If you have any questions about whether to include another officer, please contact the attorney general's office to discuss the case and determine the witness list.

On the day of the hearing, please make yourself available 10-15 minutes prior to the hearing time. A representative of the Iowa Attorney General's Office will call you to discuss the case. The attorney general's staff represents the state department of transportation. The peace officer is being called as a witness for the DOT, therefore, the attorney general's office will be the peace officer's representative at the hearing and will handle all of the legal concerns.

It is important to have a clear telephone connection; cellular telephones can sometimes be a problem if the connection is poor or your power supply begins to dwindle. If you have children or animals at home which cause background noise please cover your handset mouthpiece when not testifying.

Please have available your complete file including all police reports, copies of operational checklists, evidence cards or data master printouts, telephone logs and the like. Defense lawyers may ask you about any range of topics and it is important to be well prepared and have all of the documents which may become an issue. If you were issued a subpoena duces tecum, please make sure you bring a copy of all of those materials as well.

Please remember that the attorney general's staff person has no prior knowledge of the particular case until they contact you to review the matter. The sheer number of OWI cases make it difficult to obtain reports ahead of time. Therefore, please be available prior to the hearing time, have all of the necessary paperwork, and be prepared to discuss the case in detail.

Typically, the attorney general's representative will ask you the following types of questions:

Did you stop the motor vehicle and why?

If not, how did you come in contact with the driver and why do you believe that person was

operating?

What observations did you make that led you to believe the driver might be impaired?

Did you give the driver the standard field sobriety tests and what were the results?

Did you administer a preliminary breath test?

Did you place the driver under arrest for OWI?

Did you read the driver the implied consent advisory?

What type of chemical test did you administer?

Was there any problem with the test or the machine?

Did the driver ever ask to speak to anyone such as an attorney or family member before taking or refusing the chemical test?

Telephone hearings are similar to being in court, except that officers are on the telephone instead of being on the stand. An administrative law judge presides and will swear-in the witnesses, who will be examined and cross-examined by counsel or representatives of the state. The hearing is recorded and the judge will issue a written decision within a few weeks.

The evidence presented at implied consent hearings typically revolves around the testimony of the peace officer. Cases are usually won or lost based upon the strength of the peace officer's testimony, which ultimately includes the officer's training, proper use of procedures, accuracy when administering field tests and chemical tests, thorough report writing, and demeanor during examination.

It is important to be prepared for the hearing so that when you are examined, you know your responses without having to pause at length, refer to your notes, or give the appearance that you are unsure of the response.

Although reports cannot contain everything the officer saw or heard, they should be accurate, thorough, and clearly written. Reports which lack specific information or which convey information in a way which is vague are not as helpful. It is not enough to merely observe and recognize symptoms of impaired driving, the officer must also be able to memorialize them

accurately and testify about them credibly.

A successful case depends upon the clarity and completeness with which the arresting officer's observations are presented.

Evidence must be clearly conveyed in the formal structured reports and in a narrative arrest report. The preparation of a good report begins in the field. All of the observations an officer makes must be memorialized as soon as possible. Statements the defendant makes can be very important, particularly when they claim to have said something other than what you heard.

While it may seem obvious that the person is impaired on the night in question, your memory may not be so clear after two or three months. Be certain to make complete notes on field sobriety tests, including specific indications of problems throughout the test. It is far better for an officer's credibility if he can tell the judge on what counts the person stepped off the line, at what count they raised their arms, and in how many seconds the person estimated thirty seconds rather than to testify that the person scored two clues on this test and three clues on that test. Specificity is always better than vagueness or generalities. While every description or minutia of information is certainly not expected or required, the more definite and clear the information, the better.

For instance, instead of writing "the driver appeared intoxicated", the officer could write: "the driver's eyes were bloodshot and watery, his speech was slurred, and he had a strong odor of an alcoholic beverage on his breath."

Some officers use recording devices and video recorders to preserve the information. This is fine; however, given the fact that technology sometimes fails us, be sure to check the tapes as soon as practical to ensure the information was recorded and that it is then transcribed to a report.

Reports should cover all of the important topics: the stop, physical observations, statements made by the defendant, field sobriety tests, PBT, arrest, the request for a chemical test, the result, any information regarding telephone call requests, and any other information that may become important.

Since it is impossible to tell which cases will be challenged at a later time, peace officers must handle each incident as if it will be reviewed and they must take the necessary steps to memorialize all of the important facts and follow the proper procedures.

When testifying, always be impartial, objective, and truthful. Avoid appearing arrogant or subjective. Be courteous to the defense lawyer, regardless of their conduct.

Remember that judges and others may not understand police jargon, therefore, attempt to convey information in plain language, avoiding codes, slang phrases, and military time.

When examining an officer, some defense lawyers will ask a question such as, “Are those all of the reasons you arrested the defendant?” If the peace officer answers in the affirmative, even though there may be more factors, the defense lawyer will attempt to portray the officer as unclear or attempt to limit the evidence. Many peace officers respond to these types of questions with responses such as, “That is all that I recall at this time.”

However, officers should not use these types of responses too frequently, nor should they use them when a point must be clearly made. For instance, when a defense attorney asks, “Did the driver say he wanted to speak to a lawyer?”, the response of, “Not that I recall.” implies the officer may be unsure whether such a request was made. Some issues, such as telephone calls, are so volatile that officers need to make the responses crystal clear. If the officer knows the answer, they should clearly state the response, such as, “At no time did the defendant ask to contact anyone.”

If you do not know the answer to a question, simply say you do not know. Never guess at answers or make statements which might compromise your credibility. You have collected the evidence and the facts, present them properly and the judge will decide

Try not to deviate from the pertinent facts; do not add testimony which is clearly irrelevant. Listen to the question and respond to what is asked. Sometimes the best answer is a short and direct yes or no, particularly when a defense attorney is examining you. When the state’s representative asks questions, you will have a greater opportunity to add relevant facts, particularly facts which the defense has specifically avoided or attempted to manipulate in their favor.

Many defense lawyers will seek to challenge your credentials, observations and interpretations of events, and your credibility. They may ask questions that cast doubt on what you saw, heard, smelled, or said, and by offering other explanations for your observations. They may challenge your training and experience and attempt to show inconsistencies in your testimony.

Do not let these tactics faze you. Simply state the truth and the facts. Don’t embellish

your training or experience. Never testify as to things you don't know. Always follow the proper procedures, always do the standardized field sobriety tests consistently and as instructed. Always take accurate notes and write quality reports. These things will assist you in maintaining your credibility.

Never argue with defense attorneys. Simply answer the questions. Do not lose your temper, even if the other party is being abusive, badgering, or overbearing. Some attorneys may sound argumentative or may intentionally attempt to anger the peace officer. Regardless of the other party, always be polite and courteous. Do not hedge, play games with, or try to outsmart defense attorneys. Just answer their questions.

Listen carefully to the question. Do not make up anything or guess. If you do not understand the question, say you don't understand. If you do not know the answer, say you don't know. Do not volunteer information. Give short answers if that is what is called for; a simple yes or no is a sufficient answer for many questions. Do not feel you have to justify or explain your conduct, you are not on trial; just answer the question and do not go off on a long explanation or justification.

Do not respond, "yeah" or "uh-huh"; clearly state "yes" or "no". Give positive, definite answers and avoid terms such as, "I think", "I believe", or "sort of like." If you make an incorrect statement, correct it immediately or as soon as possible. When estimating or approximating, be sure to indicate such.

Witnesses may not make objections; counsel for the two sides make objections. If an objection is made, do not answer the question until the judge has made a ruling. Sustaining the objection means the judge agrees with the objection and the question cannot be asked. An overruled objection means the question must be answered. Peace officers should never refuse to answer any questions when directed to answer by the judge.

After the hearing is concluded, feel free to contact the person who handled the hearing with any questions about what occurred. The ALJ will make a ruling within a few weeks and you will be notified of the outcome. If the department loses a case, the state's representative will determine whether to appeal the matter and the peace officer should be notified of this as well. If you ever have a question as to the disposition of a case, please contact the attorney general's staff at 515.239.1302 or toll-free 866.251.5482.

SUMMARY:

1. Be prepared for the hearing 10-15 minutes prior to the scheduled time and have all necessary reports, documents, and paperwork. Contact the attorney general's office with questions at 866.251.5482.
2. Successful cases depend upon officers following proper procedures, writing thorough reports, and testifying credibly.
3. When testifying, always be truthful and professional.

ESTABLISHING OPERATION/INVESTIGATORY STOP

In order to proceed with implied consent, a peace officer must first have reasonable grounds to believe a person was operating a motor vehicle. Therefore, the first step of the process is determining that a person was operating the vehicle.

Obviously, it is most convenient to actually witness the person driving the vehicle down the roadway. However, many times an operator is not actually stopped while driving nor are there any witnesses to the operation.

In these situations the peace officer must ask questions and gather evidence to develop a reasonable belief the person was operating the vehicle. If the peace officer is able to substantiate a belief that a person was operating, the officer may proceed with implied consent. The standard is whether a reasonable person would believe the offense had been committed. At the time of the administrative hearing, the burden of proof is on the licensee to show they were not the operator.

The Iowa Supreme Court approved a jury instruction which defines “operates” to mean, “the immediate, actual physical control over a motor vehicle that is in motion and/or has its engine running.”

Therefore, under Iowa law, a person is considered an operator of a motor vehicle if the vehicle is in motion or has its engine running.

A motor vehicle is defined as a vehicle which is self-propelled. Besides trucks and automobiles, other motor vehicles include snowmobiles, tractors, golf carts, or any other vehicle which is self-propelled. A driver of any of these vehicles is subject to implied consent and may be arrested for OWI.

Operating a vehicle is not necessarily synonymous with driving. Several court cases have established a person as operating in the following scenarios:

The driver was found behind the steering wheel of a car with the engine running while his companion pushed the car in an attempt to move it from the ditch,

The driver was encountered by police after starting the engine but before moving the

vehicle,

The vehicle's engine running, with the transmission in drive, and the defendant's foot on the brake,

The driver having one foot on the brake and one foot on the accelerator with the engine running,

The driver was sitting behind the steering wheel with the engine running and the lights on, parked in the middle of a gravel road but not moving, and

The driver was behind the wheel of a car with a burned-out clutch.

A driver is subject to implied consent anywhere in the state of Iowa; they do not have to be on a public highway and cannot be protected by being on private property. As long as the person is operating a vehicle within the state of Iowa, they can be arrested.

Drivers often claim they were not the operator. Even when an officer stops a vehicle that has been in motion, some people will later attempt to claim they switched drivers after the stop. It is important when making contact and when communicating, to ask questions that elicit a statement confirming the person was driving.

Some drivers think that if an officer does not actually see them drive, they cannot be arrested. They certainly can be, but it is important to take the opportunity to elicit a statement from them about when they were driving and whether they consumed any alcohol since they stopped driving.

Some drivers will claim someone else drove, but that person left the scene, or that the driver was a stranger who disappeared. Peace officers should do their best to inquire about the identity of the alleged driver and rule out this possibility.

Some officers, when told that a person, such as the alleged driver's friend, actually drove, have called the friend on the telephone and confirmed they did not actually drive.

It is important to interview all of the passengers in a vehicle to determine who the driver was. It may be best to separate them before interviewing them to ascertain individual responses. Remember to ask clear, unambiguous questions, such as, "Was John Smith driving the vehicle

when it went into the ditch?”

Judges tend to give strong weight to what was said to the peace officer on the night in question, rather than what is said at the hearing. Therefore, it is important to ask the relevant questions of all of the available parties, and to memorialize all of the information thoroughly and accurately in the written report.

While some encounters derive from an accident or other situations where the officer does not witness the person driving, most arrests begin with the actual stop of a motor vehicle arising from something improper the officer witnesses.

While the stop can be due to many factors (including a report of problem driving or an incident unrelated to driving such as a domestic dispute) most often the peace officer will stop a motor vehicle which is being driven down the roadway.

Problematic driving is usually the first indicator in the development of the reasonable grounds test.

The Iowa Supreme Court recognizes three reasons for an investigatory stop of a motor vehicle:

1. When an offense is committed in the officer's presence,
2. When the officer has a reasonable cause to believe a crime may have occurred or criminal activity is afoot, and
3. When the officer is performing a legitimate community care-taking function.

When a law enforcement officer sees a traffic offense, however minor, the officer has probable cause to stop the driver of the vehicle. An officer may also stop and briefly detain a person for investigative purposes if the officer has a reasonable cause to believe a crime may have occurred or criminal activity is afoot. The Iowa Supreme Court also recognizes a public safety responsibility to stop a motor vehicle even though no violation of any law has occurred. Examples include defective equipment, an unresponsive occupant slumped behind a wheel, or an improper lane change.

Traffic violations constitute probable cause for a stop. Driving without a seat belt or driving without a license plate are considered traffic violations and are grounds for making a stop.

The standard for an investigatory stop is reasonable and articulable suspicion that

criminal activity is or has occurred. An officer may make an investigatory stop if they are able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant the intrusion. The principal function of an investigatory stop is to resolve the ambiguity as to whether criminal activity is afoot. However, unparticularized suspicion does not justify an investigatory stop.

The vehicle may have an equipment violation, an expired or missing registration, sticker, or plate; or, most commonly, a moving traffic violation, such as speeding or a seat belt violation. A roadside safety checkpoint which turns-up impaired drivers is legal under Iowa Code chapter 321K, but only if the checkpoint is, in fact, planned and implemented pursuant to the provisions of the chapter.

The following actions may indicate an impaired driver on the roadway:

1. turning with a wide radius
2. straddling the center or lane marker
3. almost striking an object or vehicle
4. weaving
5. driving on other than the designated roadway
6. swerving
7. speed slower than 10mph below limit
8. stopping inappropriately or for no apparent reason
9. following too closely
10. drifting
11. having tires on center or lane marker
12. braking erratically
13. driving into opposing or crossing traffic
14. driving in opposing lanes, wrong way, or one way
15. improper or unsafe lane change
16. slow response to traffic signals
17. signaling inconsistent with driving actions
18. turning abruptly or illegally
19. accelerating or decelerating rapidly
20. driving with headlights off
21. appearing to be impaired: eye fixation, tightly gripping the steering wheel, slouching in the seat, gesturing erratically or obscenely, face close to the windshield, drinking in the vehicle, head protruding from vehicle, etc.

Observe how the driver responds to the signal to stop and how the driver handles the vehicle during the stopping sequence. After activating lights or sirens, the driver may exhibit further indicators of impairment, including:

1. not responding to lights or sirens
2. slow response to lights or sirens
3. abrupt swerving
4. sudden stopping
5. striking the curb or another object
6. problems maintaining a proper lane position
7. braking problems
8. abrupt turning off the roadway
9. parking the vehicle in an improper manner
10. failure to come to a complete stop
11. failure to take the vehicle out of gear
12. driving in opposing lanes
13. attempting to flee/evade
14. furtive movements within the vehicle by the driver or occupants.

An impaired motorcyclist may drift during turns or curves, weave, drive evasively, and experience problems when turning, such as exhibiting unsteadiness, making sudden corrections, improper leaning angles, and late braking. Once stopped they may have trouble keeping the motorcycle balanced and dismounting properly.

SUMMARY:

1. A person is operating if they are behind the wheel of the vehicle with the engine running.
2. In situations where the engine is not running, ask questions and gather evidence sufficient to place the person behind the wheel when the engine was running or the vehicle was in motion.
3. A peace officer must have a reasonable and articulable suspicion to stop a motor vehicle.

ACCIDENTS

Drivers involved in motor vehicle accidents are subject to implied consent either voluntarily, by warrant, or by order of a physician, if the doctor certifies they are dead, unconscious, or otherwise in a condition rendering them incapable of consent or refusal.

Accidents can present special problems for peace officers in determining whether to invoke implied consent. For instance, no one saw a driver, the suspected driver is not in a condition to provide information or conduct field sobriety tests, the driver is no longer at the location, or the suspected driver is found at another location, such as their residence, but is uncooperative.

Because many accidents are caused by intoxicated drivers and may result in injury or death, it is important for peace officers to conduct a thorough investigation in an attempt to turn an accident situation into a successful OWI and license revocation when the officer can appropriately establish a connection between drinking and driving.

When a driver is still at the scene or has been transported to a hospital, it is important that the peace officer ask questions of the driver, including whether they were driving or who was, the time of the accident, and whether they consumed any alcohol after the accident. Gaining an admission of driving, an approximate time, and ascertaining whether any post-operation consumption of alcohol occurred will assist greatly in developing a successful case. At some hearings, the driver will claim to having consumed alcohol after the accident or testify that someone else had driven, therefore, collecting as much evidence on the date of the incident can be very helpful.

Because officers typically have fewer facts to rely upon in accident situations, all of the potential facts are important in being able to establish reasonable grounds. Make sure to check for alcohol odors, bloodshot eyes, slurred speech and other signs of possible intoxication. Make close contact with the driver and ask them questions if they are able to communicate. If possible, do an HGN test on the subject.

An accident causing injury or death justifies a PBT. However, always look for other factors which may be present.

Do not discount bloodshot eyes, slurred speech, or other observations, statements, or behavior which a driver exhibits after an accident. Note the observations which are consistent

with alcohol or drug use. While there may be explanations other than alcohol, or a combination of explanations for these observations or behaviors, the peace officer should consider all factors in determining reasonable grounds.

An accident, in and of itself, may suggest an impaired driver. It is important to note factors which eliminate other explanations such as weather and road conditions, vehicle problems, or evidence of braking. A witness may be able to describe driving behavior and identify the driver or occupants.

At the administrative hearing, it is not uncommon for the suspect to claim either they were not the operator or that they became intoxicated after driving. Therefore, it is important for the peace officer to ascertain as much information as possible from available persons at the time of the incident.

Ask the suspect if they were driving, when they last drove, whether they consumed any alcoholic beverages or drugs after driving. If they claim someone else was driving, find out specific names, addresses, time frames, where the person went, whether there were any other parties involved. Separate persons if there is more than one occupant and question them separately.

If a person claims they were not the driver, they can still be arrested if the peace officer has a reasonable basis to believe they were the driver. Likewise, if a person claims consumption after driving, the peace officer can still arrest and test the individual if the officer has a reasonable basis to believe they were impaired prior to driving. Ask them what they drank, where they drank, and then look for the containers or other evidence.

For instance, a driver may say he drank two Budweiser beers after the accident; however, the only beer cans in the bed of the truck are Miller Lite which appear old. The lack of any containers is strong evidence the person did not consume alcohol after the accident. Search the general area to counter an argument they threw the containers in the ditch.

In some accident cases few, if any, reports are generated. If an officer is involved in an accident situation, either at the scene or at the hospital, a report should be made which memorializes all of the facts and circumstances which warrant the invocation of implied consent. If other officers or other departments were involved, make sure to obtain their reports prior to the hearing.

It is important to communicate information between agencies, particularly when one

department handles the accident scene and another is requested to go to a hospital and request a chemical specimen. Remember, the officer making the request for the chemical test must possess reasonable grounds to ask for such a test. The officer can rely on information another officer shared. The officer should also look for clues of intoxication and ask questions while with the suspected driver.

The peace officer requesting the test will be the person issued a subpoena to testify at the implied consent hearing and must have a reasonable basis to ask for the test. If multiple officers are involved, the requesting officer must get information prior to the test request to establish the subject as an impaired operator. The requesting officer should also make observations of the subject to determine breath odor and eyes, and attempt to converse with the subject, if possible, to determine speech problems, admissions of driving, and admissions of drinking.

If no one observed the vehicle being operated and no one is admitting driving, the case must be built on circumstantial evidence.

Ownership of the vehicle should be considered as most people drive their own vehicle. Control of the vehicle can include location behind the wheel or possession of keys. The absence of other people in the area or the location of bodies should be noted. Any injuries which are consistent with features of the interior of the vehicle can be strong indicators, such as the presence or absence of chest injuries from a steering wheel, fragments of glass in the scalp, skin or hair, or the presence of skin, hair, or fabric in the windshield. Evidence of immediate prior driving can include a warm hood or engine, warm tires, or tracks in newly fallen snow or wet pavement. Shoe prints may exist on the vehicle foot pedals which could be compared with the suspect's shoes.

At the time of the request, read the implied consent advisory, make a request for specimen, and have the driver sign the form if possible. The driver's signature is not necessary although the peace officer should always sign the form. If the driver is unconscious or otherwise in a condition rendering them incapable of consent or refusal, have the physician certify the special form utilized for such purposes. (See Item C in Attachments and Forms)

After a blood or urine test is collected, the peace officer should not fill-in any more information on the implied consent form after request for specimen which is marked as Section C on the form. (See Item A in Attachments and Forms)

The driver's copy of the top of the form may be given to the driver but do not serve any notice of revocation as the test results are not complete.

When the blood or urine test result is returned to the department, the same officer who requested the test should fill in the appropriate information on the form and certify under penalty of perjury at the proper location on the bottom of the form.

There are two ways in which the notice may now be served; either the peace officer who made the request may personally serve the driver or the peace officer may send the form to the DOT's Office of Drivers Services and the department will handle the service. You may fill-in the section for service of the notice of revocation if you personally serve the driver, but do not fill-in this section if you want the DOT to provide service.

Collecting a sample by using a search warrant is not a part of implied consent. Special rules and forms apply in those cases. If a warrant appears appropriate, the officer may wish to contact the local county attorney for consultation and assistance. Advance planning between the county attorney and the law enforcement agency is an appropriate way to prepare for such situations.

SUMMARY:

1. Since accidents often diminish typical evidence gathering, it is important to take extra steps to determine if sufficient evidence of operation and intoxication exists for implied consent.
2. Ask the suspected driver and any witnesses who was driving, when the accident occurred, and whether any alcohol was consumed after driving.
3. When a blood or urine test is taken, hold the implied consent paperwork until the test results become available.

DEVELOPING REASONABLE GROUNDS

To proceed with implied consent, a peace officer must have reasonable grounds to believe the person operated a motor vehicle in violation of the statute.

What determines reasonable grounds has been developed over time by the case law, which has indicated that the reasonable grounds test is met when the facts and circumstances known to the officer at the time he is required to act would warrant a prudent person in believing the offense had been committed.

When a peace officer believes someone may be impaired, they need to continue to add all of the facts leading to that belief together until the time the officer must make a decision to invoke implied consent.

This begins with the driving and stop sequence, which was previously discussed, and continues forward from that point. The totality of the circumstances must be considered when judging an officer's decision on whether to invoke implied consent, including driving problems, admissions and statements, physical observations, physical evidence, and field sobriety tests.

The officer should be asking: when I approach the vehicle, what do I see? When I talk to the driver, what do I see, smell, and hear? How does the driver respond to my questions?

Based upon information from this face-to-face encounter, the officer may decide to request the driver to perform field sobriety tests. When the driver exits the vehicle, the officer should note how the person exits and walks.

Many indicators of impairment will be evident through sensory observations made by the peace officer, including:

Sight observations:

- bloodshot eyes
- dilated pupils
- flushed face, abnormal skin coloration
- reaction to light
- soiled clothing
- fumbling fingers for license, registration, insurance

- alcohol containers
- drugs or drug paraphernalia
- bruises, bumps, scratches
- unusual actions or attitude, sleepy or combative

Sound:

- slurred speech, slow or thick tongued
- incoherent speech
- admission of drinking
- inconsistent responses
- abusive or profane language
- unusual statements
- repetitive questions or answers
- slow responses
- differing responses or incorrect information

Smell:

- odor of alcoholic beverage
- odor of marijuana
- unusual odors
- cover-up odors such as breath spray
- vomit or belching
- urination or defecation in clothes

In addition to observations, officers may ask the driver questions which intentionally challenge their ability to respond appropriately. For instance, asking for two or more things simultaneously such as a driver's license, registration, and proof of insurance and failing to get them all. Asking interrupting or distracting questions, such as "where were you coming from" while they are looking for their proof of insurance, may cause an impaired person to forget what you originally asked of them. Asking unusual questions may illicit incorrect answers. For instance, if you ask the driver's middle name and they tell you their first name, or if you ask their date and year of birth and they give you the month and date instead.

How the driver exits the vehicle may provide additional facts for reasonable grounds. Note if the driver cannot open the door, has trouble with a window, leaves the vehicle in gear,

climbs out, stumbles, staggers, or falls, or leans on the vehicle or otherwise uses the vehicle for balance.

Based upon initial observations and statements made, the peace officer should then proceed to the administration of field sobriety tests, which will also be used as a basis for reasonable grounds. (Field sobriety tests are covered in the next section.)

Evidence gathering for reasonable grounds continues after the arrest and before the request for the specimen. The driver may make unsolicited statements on the way to the law center (although it is important not to interrogate an offender unless they have been Mirandized), or they may cry, sing, throw themselves around the backseat, vomit, urinate, defecate, or make inappropriate or odd comments or threatening statements. Upon arrival at the law center, the offender may exhibit problems with balance, such as falling into corridor hallways or doors, and may need assistance walking.

SUMMARY

1. Reasonable grounds exist when the facts and circumstances known to the officer at the time he is required to act would warrant a prudent person to believe the offense had been committed.
2. Reasonable grounds is not one particular fact but all of the information the officer possesses, taken together. It includes driving problems, the driver's physical appearance, behavior, statements and admissions, and performance on any field sobriety tests. All of these factors may be considered up to the point of requesting a chemical test.
3. Always memorialize all of the information in your reports.

FIELD SOBRIETY TESTS

Field sobriety tests are a valuable tool in assisting a peace officer in determining whether a motor vehicle operator may be impaired due to alcohol or drugs. When properly administered and interpreted by a certified officer, they are a highly reliable tool for evaluating potential OWI drivers.

While there are many field tests which can be utilized, three particular tests are considered “standardized field sobriety tests,” a battery of tests administered and evaluated in a standardized manner to obtain validated indicators of impairment based on National Highway Traffic Safety Administration research.

These tests include the Horizontal Gaze Nystagmus (HGN), Walk and Turn (WT) and One-Leg Stand (OLS). These three were chosen because they are highly reliable indicators of impairment. The WT and OLS are relatively simple for sober drivers to complete correctly, and apply the concept of divided attention, which makes the test difficult to complete correctly for individuals under the influence of alcohol or drugs.

In order for the tests to be the most reliable, they should be administered as instructed by the Iowa Law Enforcement Academy. The complete Academy instructions are attached as Item F in Attachments and Forms for reference.

Horizontal Gaze Nystagmus Test

Nystagmus is an involuntary jerking of the eyes. Horizontal gaze nystagmus refers to an involuntary jerking of the eyes occurring as the eyes gaze to the side. In addition to being involuntary, the jerking is also unconscious. The person experiencing the nystagmus normally is unaware that the jerking is happening and is powerless to stop or control it.

With individuals under the influence of alcohol, the involuntary jerking of the eyes becomes much more pronounced and readily noticeable. As a person becomes more intoxicated, the onset of the nystagmus, or jerking, occurs after fewer degrees of lateral deviation, and the jerking at more extreme angles becomes more distinct.

The HGN is the most accurate of the standardized field sobriety tests and when used in combination with the other two standardized tests, will reliably disclose whether or not an OWI suspect’s alcohol concentration is .08 or greater.

The horizontal gaze nystagmus has three clues for each eye for a total of six clues. Four or more clues is considered a failing score. The clues are as follows:

1. Lack of smooth pursuit
2. Nystagmus onset prior to 45 degrees
3. Nystagmus at maximum deviation.

It is recommended that the HGN test be administered first. It is the most reliable test and is the easiest to administer. It can be done even when the weather or the road conditions are poor. The driver is more likely to consent and do the test if they are just standing and looking rather than walking and giving responses. If they begin balance tests and have obvious problems, they may be unwilling to continue other tests. Conducting the HGN first ensures the best chance of obtaining results from the most reliable test.

There are other categories of nystagmus but they will not influence the HGN test if the test is administered properly. These include optokinetic nystagmus and vestibular nystagmus which includes rotational nystagmus, post-rotational nystagmus, caloric nystagmus, and positional alcohol nystagmus.

Physiological nystagmus is a natural nystagmus but generally too small to be seen with the naked eye. A properly administered HGN test will not be affected by physiological nystagmus. Nystagmus can be caused by some pathological disorders such as brain tumors or other brain diseases, however persons suffering from these disorders are rarely able to drive.

Prior to passage of the .08 legislation, ILEA training indicated the failure on the HGN test to be 77% accurate to indicate an alcohol concentration of over the legal limit. The Walk and Turn test was considered 68% accurate and the One Leg Stand test 65% accurate. A combined HGN and the Walk and Turn tests was considered 80% accurate.

Please note that new certification of the SFST have been made for the .08 BAC level. ILEA provides training which indicates that when all three tests are administered and the person exhibits failing scores, the likelihood is 93% that the person is at or over the .08 BAC level.

Walk and Turn Test

The walk and turn test has eight clues as follows, and two or more is considered a failing score:

1. Loss of balance during the instruction
2. Starting too soon
3. Stopping while walking
4. Failure to touch heel-to-toe
5. Stepping off the line
6. Using arms for balance
7. Losing balance on the turn or turning incorrectly
8. Taking the wrong number of steps

One Leg Stand Test

The one leg stand test has four clues as follows, and two or more is considered a failing score:

1. Swaying while balancing
2. Using arms for balance
3. Hopping during the test
4. Putting the foot down

Other field tests which are commonly utilized and which can assist in determining whether a peace officer has reasonable grounds to invoke implied consent include:

1. Reciting the alphabet.
2. Counting backwards.
3. Finger count.
4. Rhomberg/Modified Rhomberg.

Be sure to conduct these or other tests in accordance with your training.

Some tests can be completed while the driver is still in the car. If poor weather conditions exist, do an HGN test in the patrol car. Other field sobriety tests can be done at the law center prior to invoking the implied consent.

A driver has no obligation to perform the field sobriety tests. However, if a person refuses testing, the peace officer may still invoke implied consent and/or arrest the driver if the officer has reasonable grounds to believe the driver violated the law. While field tests are

preferable, without them the peace officer can proceed based upon other factors such as an odor of alcohol, slurred speech, and driving problems.

SUMMARY:

1. The standardized field sobriety tests (SFST) include the horizontal gaze nystagmus, walk and turn, and one leg stand tests.
2. The SFST's should always be administered and scored in the appropriate manner. (See Item F in Attachments and Forms for SFST training material.)
3. Other field tests can also be utilized and relied upon by an officer in developing reasonable grounds.

PRELIMINARY BREATH TEST

Iowa law permits the use of a preliminary breath test (PBT) when an officer has reasonable grounds to believe a motor vehicle operator may be committing or has committed the offense of OWI or when the operator has been involved in a motor vehicle collision resulting in personal injury or death.

Iowa law also permits a PBT to be used for the purpose of deciding whether to arrest a suspect. However, a PBT should never be the sole factor in the decision to arrest. It should be used to confirm what information the officer has already gathered. The law states that the result of the PBT may be used in determining whether a chemical test should be requested and in determining what type of test to administer but may not be used in any court action.

The PBT can help to corroborate all other evidence and to confirm the officer's judgment as to whether the suspect is impaired. While the PBT result cannot be introduced at a criminal court trial, it may be considered at an administrative hearing. Whether or not the person submitted to a chemical test and whether the result was over the level of .08 BAC is always admissible. In addition, the administrative judge may allow the results of the PBT, pending any objections and depending upon the issues raised.

While many officers may consider the PBT as a field sobriety test, some judges may not consider the PBT as inclusive with field tests. Therefore, if an officer asks a subject to submit to field sobriety tests and the subject refuses, it is preferable to then specifically ask the subject to submit to a PBT. This removes any question about the subject's consent or refusal to submit to a PBT.

As indicated previously, because the administrative law judge may consider the PBT invalid as evidence in the implied consent hearing, we recommend that the subject be arrested for OWI after the PBT and that the subject be specifically told they are under arrest for OWI. This ensures that requirements for a proper implied consent test exist, regardless of whether the PBT is ultimately considered.

The PBT can also be used as an indicator to help determine whether illegal drugs may be involved. If a subject appears impaired but tests .00 or well below .08 on the PBT, the officer may want to consider whether controlled substances are involved.

Always instruct the subject on the method to provide a proper PBT sample. If it

appears the subject failed to provide a proper sample as instructed, indicate such in the police report.

Iowa Administrative Code section 661-7.5(2)(321J) requires a record be kept of each calibration of PBT units. All devices are to be calibrated and the required items recorded, at least once per month. Some administrative law judges may disregard the PBT if the log is not complete. If the PBT is disregarded, the case will be lost if there is not an arrest for OWI or some other qualifying factor. It is important that PBT logs are utilized and completely filled out as required.

Attached as Item B in Attachments and Forms is a PBT calibration log which can be utilized to comply with these requirements.

SUMMARY:

1. A preliminary breath test (PBT) can be used to assist in determining whether to make an arrest or proceed with implied consent, but the test should never be the sole basis to proceed.
2. PBT units should be calibrated on a monthly basis and a complete log should be maintained for each unit. (See Item B in Attachments and Forms)
3. Only one PBT is required.

OWI ARREST/STATUTORY REQUIREMENTS TO PROCEED WITH IMPLIED CONSENT

After considering all of the information, the peace officer must decide whether to arrest the individual. The standard upon which this decision must be made is called probable cause to make an arrest. This standard is established by the constitutions of the United States and Iowa, by statute, and by case law. Iowa law permits peace officer to make arrests without a warrant for a public offense committed or attempted in the peace officer's presence; or where a public offense has been committed and the peace officer has probable cause for believing that the person to be arrested has committed the offense.

Consensual completion of a drug recognition examination following an arrest for a different offense does not constitute an arrest for OWI.

Only peace officers with special training who meet the definition of Iowa Code section 321J.1 can invoke implied consent. An officer without the required training may arrest a driver for OWI, but then a certified officer must make their own independent assessment of intoxication for the implied consent to be valid.

If an uncertified officer makes the arrest, a certified officer need not re-arrest, but must develop independent reasonable grounds before invoking implied consent. The certified officer must make their own observations (odor, eyes, etc.), and conduct their own FSTs.

To avoid potential problems, we recommend that if an uncertified officer encounters someone they believe to be impaired, that officer should then contact their agency to arrange for a certified officer to arrive and conduct the investigation, field testing, arrest, and implied consent process.

There are no jurisdictional issues regarding invocation of implied consent. If the officer is a properly certified peace officer in the state of Iowa, the officer can invoke implied consent anywhere within the state.

Statutory Requirements for Implied Consent

In order to make a request for a chemical test under the implied consent law, the peace officer must have reasonable grounds to believe that the person was operating a motor vehicle in violation of section 321J and at least one of the following conditions must exist:

- a. A peace officer has lawfully placed the person under arrest for violation of section 321J.2.
- b. The person has been involved in a motor vehicle accident or collision resulting in personal injury or death.
- c. The person has refused to take a preliminary breath screening test provided by this chapter.
- d. The preliminary breath screening test was administered and it indicated an alcohol concentration equal to or in excess of the level prohibited by section 321J.2
- e. The preliminary breath screening test was administered to a person operating a commercial motor vehicle as defined in section 321.1 and it indicated an alcohol concentration of 0.04 or more.
- f. The preliminary breath screening test was administered and it indicated an alcohol concentration less than the level prohibited by section 321J.2, and the peace officer has reasonable grounds to believe that the person was under the influence of a controlled substance, a drug other than alcohol, or a combination of alcohol and another drug.
- g. The preliminary breath screening test was administered and it indicated an alcohol concentration of .02 or more but less than .08 and the person is under the age of twenty-one.

An officer must have at least one of the above but can have more. Because the PBT result may be considered invalid, we recommend that officers record all of the conditions which permit invocation of implied consent, including an arrest for OWI if appropriate. If an arrest is made, the officer should specifically inform the person they are under arrest for OWI.

SUMMARY:

- 1. The peace officer requesting the chemical test must be a “peace officer” as defined in Iowa Code section 321J
- 2. In order to proceed with implied consent, at least one of the above seven requirements

must be met.

3. Record all of the seven conditions which exist, including an arrest for OWI if appropriate.

IMPLIED CONSENT ADVISORY

Prior to requesting a chemical test the peace officer must advise the person of what is referred to as the implied consent advisory. The advisory is derived from Iowa Code section 321J.8 and is contained in a packet of forms used to request the specimen (see Item A in attachments and forms). The advisory states:

“The Implied Consent Law requires that a peace officer advise the person of the following:

1. Refusal to submit to the withdrawal of a body specimen for chemical testing will result in the revocation of your privilege to operate a motor vehicle for one year if you have not previously been revoked within the previous twelve years under the implied consent or drunk driving laws of this state, or for two years if you have one or more revocations within the previous twelve years. If you are under age 18, the revocation will be for the above periods, or until you reach the age 18, whichever is longer.
2. Refusal to submit to a blood or urine test for drugs other than alcohol or a combination of alcohol and another drug constitutes a refusal and the above mentioned revocation periods apply.
3. If you consent to chemical testing and the test results indicate an alcohol concentration of eight hundredths or more, or if the test results indicated the presence of a controlled substance or other drug or a combination of alcohol and another drug in violation of 321J.2, the department shall revoke your privilege to operate a motor vehicle for a period of 180 days if you have no revocation within the previous twelve years under the drunk driving or implied consent law, or for one year if you have one or more previous revocations under those provisions. If you are under age 18, the revocation will be for the above periods, or until you reach age 18, whichever is longer. If you are under age 21 and the test results indicate an alcohol concentration of two hundredths (.02) but less than eight hundredths (.08), your license will be revoked for 60 days if you have no previous revocations under Iowa Code Chapter 321J within the previous twelve years or 90 days if you have a previous revocation under Iowa Code Chapter 321J within the previous twelve years.”

Operators of commercial motor vehicles have an additional advisory which can be found

in the section on Commercial Motor Vehicle Operators.

The request for the chemical specimen must be in writing. Reading the implied consent advisory fulfills the requirement that the request be in writing. Actual delivery of the written demand is not strictly required by the statute, but if a person requests to read the advisory they must be given a copy.

While it is preferable to have the driver sign the form, it is not required. Refusal to sign is not by itself considered a refusal to take the test. Officers should still ask the subject whether they are consenting to or refusing the test.

It is the driver's verbal consent or refusal that is binding. If they do not wish to sign, simply skip the driver signature line and complete the rest of the form. An officer may write, "refused to sign" in the driver signature space. The peace officer should sign the form as well. If you forget, sign it as soon as possible after the request.

It is not necessary to read the request when a physician has certified the driver as a being considered dead, unconscious, or otherwise in a condition rendering them incapable of consent or refusal.

When reading the implied consent advisory do not add or subtract any information. Read the advisory verbatim from the form. If the person is interrupting or appears to be ignoring the statement just continue to read the advisory in its entirety. It is mandatory that an officer read the advisory, it is not mandatory for the driver to listen.

Be careful not to specify a length of the revocation if you do not know whether a prior revocation exists.

Never tell a driver under age 21 that the revocation will only be an .02 violation of 60 or 90 days. If the under age 21 driver takes the test and the result is over .08, they will be required to be revoked for the longer period. Similarly, if a driver under age 21 refuses the test, they would be subject to the longer period of revocation. Under either situation, the under age 21 driver may be subject to a OWI criminal charge.

Peace officers are only required to read the implied consent advisory. They are not required to inform drivers about work permits, interlock devices, fines, or to give any other information. Be careful not to give advice to a driver.

Drivers may have prior convictions, deferred judgments, or suspensions on their driving record. None of these are considered a previous revocation. Convictions and deferred judgments are criminal matters which do not affect the administrative revocation. If a conviction carries with it a revocation, that will be noted as a revocation on the DOT license record. Out-of-state convictions for OWI do not apply as these are recorded as suspensions, not revocations.

The statute requires you to revoke the driver's license for the enhanced or longer period if a person has a previous revocation under the chapter within the previous 12 years. When examining a driving record, do not count convictions but only revocations. The county attorney will consider prior conviction history when determine whether to file criminal charges.

Previous .02/zero tolerance revocations count as a prior revocation. Therefore, if a driver has a prior revocation for .02/zero tolerance, they should be revoked for the longer period for the current offense.

If you are unsure about the period of revocation, serve the driver with the notice of revocation for the lesser period and the DOT's Office of Driver's Services will later amend the notice if their records indicate an enhanced period is required. In any case, be sure you read the implied consent advisory in its' entirety, and always refer to those periods of revocation if the driver has questions.

Revocation Periods

Revocation and disqualification periods are as follows:

1. Zero tolerance-Alcohol concentrations between .02-.08 for under age 21 drivers:

60 days: first offense test result
90 days: second or subsequent test result
one year: first offense test refusal
two years: second or subsequent test refusal

2. OWI

180 days: first offense test result over .08
one year: second or subsequent test result over .08

one year: first offense test refusal

two years: second or subsequent test refusal

3. Under age 18

above OWI periods or until 18th birthday, whichever is the greater period

4. Disqualification for commercial motor vehicle operators

one year: any test refusal or test result over .04

three years: any test refusal or result over .04 with a vehicle transporting
hazardous materials which requires vehicle placarding

lifetime disqualification: any previous OWI, disqualification, test refusal, failure to
stop and render aid at the scene of an accident, felony, or aggravated
misdemeanor.

SUMMARY:

1. Always read the implied consent advisory in its entirety, regardless of the age of the driver or whether the driver is interrupting or appears to be ignoring the statement.
2. Do not deviate, add, or subtract information from the advisory.
3. Do not interpret the advisory or otherwise give the driver legal advice.

CHEMICAL TESTS: PROPER REQUESTS, PROCEDURES, AND EQUIPMENT USE

After the implied consent advisory has been read, the peace officer must make the request for the chemical test. Always read the language on the form which states, “Having read to you the appropriate Implied Consent Advisory, I hereby request a specimen of your [blood] [breath] [urine] for chemical testing to determine the alcohol or drug content.” Indicate the date and time on the form and sign the form as the officer requesting the test.

Ask the driver to either consent to or refuse the test, mark the appropriate box, and sign the form. If the driver will not check a box or sign the form, simply continue with the testing procedure. Refusal to sign the form is not considered a refusal to take the test. A verbal consent or refusal is sufficient. The officer may write, “refused to sign” in the space for the driver’s signature.

If the peace officer is requesting blood and the driver refuses, the peace officer must offer an alternate specimen or there is no refusal. Use the second portion of section “C” on the form entitled, “Request For Alternate Specimen”, which states, “Withdrawal of a blood specimen having been refused, I hereby request a specimen of your [breath] [urine] for chemical testing to determine the alcohol or drug content.” Again, indicate the date and time on the form.

If drugs are suspected, or if the driver tests under the legal limit on a breath test but the officer believes drugs are involved, use the third portion of section “C” on the form entitled, “Request For A Specimen For Drugs”, which states, “Having reasonable grounds to believe that you are under the influence of a drug other than alcohol or a combination of alcohol and another drug, I hereby request a [blood] [urine] specimen for chemical testing.” Fill in the date and time of the request and ask the driver to sign the form.

Two-hour time period

Iowa law provides that the results of a chemical test performed within two hours after operation are presumed to be the same as those which would apply at the time of operation. This means that as long as a test is administered within that two-hour window, the presumption is that the driver was at that level when operating.

For the purposes of implied consent, the peace officer is merely required to offer a chemical test within two-hours of the time of either a PBT test, PBT refusal, or an arrest for

OWI, whichever of the three occurred first. The chemical test must be offered within two hours, it does not have to be received within two hours.

However, since alcohol can dissipate rather rapidly, it is always desirable to obtain a test as soon as practical.

Peace officers should always offer the chemical test before the two-hour time period expires. In the criminal process, there is a presumption that any test administered within two hours of operation is considered the driver's BAC at the time of operation.

When faced with a situation where the two-hour period is in jeopardy, make sure the request is made within two hours. For instance, when someone wants to talk to an attorney, the officer may request the specimen before the telephone call and then wait for the driver's decision until the conclusion of the telephone conversation.

If the peace officer fails to offer a test within two hours of the PBT/arrest time, the subject is not required to submit to testing and a refusal to test will not result in a revocation.

Write the time of the request for the test on the implied consent form, not the time the test is administered. The test time can be placed on the evidence card and checklist, or it will automatically be printed on a Data Master cdm ticket.

The two-hour period does not apply to a test when the driver was involved in a motor vehicle collision which resulted in personal injury or death unless a PBT or arrest has triggered the two-hour rule.

Chemical Test Options

There are three types of body specimens which peace officers may request of a driver: blood, breath, and urine.

The choice of which chemical test to offer is that of the peace officer. However, if the officer requests a blood test, the driver may refuse that test without revocation. In that situation, the officer is required to ask for one of the other two chemical tests and the driver must submit to that test or it will be considered a refusal.

The driver may not place conditions on the taking of the test or the test type. Officers

are not required to give more than one test and do not have to repeat any tests at the request of the driver. However, drivers do have a right to an independent chemical test if requested.

The Data Master cdm is the only instrument in use in Iowa for the purpose of evidentiary chemical breath testing.

Data Master cdm

Officers must be certified on using the device and then must follow the instructions (found in Item F under Attachments and Forms). Begin by entering information before testing, including the driver's name and other information. The Data Master conducts an internal calibration of the instrument before use. An operational checklist is required to be filled out by the peace officer while conducting the test.

When "please blow" appears, the driver has approximately two minutes to produce a sample. Instruct the subject as follows, "Place your mouth on the mouthpiece and blow long and steady into the tube until I tell you to stop."

Once the subject starts to blow through the breath tube, the instrument's beeping tone will change to a steady tone which indicates that the instrument is receiving an adequate breath flow. You may tell the subject to stop blowing when you hear a single beep. If an acceptable sample is not provided within the allotted time, the instrument will display, "Subject Refuse? <Y/N>". Type "N" for "No" and restart the sequence. Type "Y" for "Yes" if the subject is refusing and the instrument will print that the test was refused.

If the machine accepts the sample as adequate it will print the result on the tickets. The device will test the same sample twice and give two printouts.

If the machine does not accept the test as valid, it may print one of several other readings.

Invalid sample can mean the instrument detected mouth alcohol. If this occurs, the subject should be retested after a short wait.

Interference will occur when the instrument detects a chemical substance other than ethanol such as acetone, methanol, or isopropyl. If this occurs, conduct another test.

In some instances, the subject may be blowing but the device is not completing a result. In these instances, the officer may use the "N.V." or "sample override" key which allows the

operator to interrupt and override the normal sample criteria of the instrument and force acceptance of the test results as of the time it is pressed. Any test result obtained using this method will result in a lower than actual subject test unless the subject is alcohol free.

If a second test is given for any reason, always make sure to replace the mouthpiece with a new one.

Always check the datamaster printout to ensure the readings are accurate and within acceptable levels. If you notice a problem attempt another test or ask for a different chemical specimen, such as a urine test.

The machine will store the results of every test and the information will be downloaded to the DCI crime lab in Des Moines. If you lose the print out ticket, the test result can be obtained by contacting the DCI.

Margin of Error

The Department of Public Safety, Division of Criminal Investigations Laboratory has determined plus or minus .004 or five percent (whichever is greater) is the margin of error for chemical testing on approved devices.

Using the laboratory's standard, the Department of Transportation will only revoke a driver for a test failure at the following levels:

- a. For an OWI, the test result must be .085 or greater,
- b. For a zero tolerance/.02 violation the test result must be .024 or greater, and
- c. For a commercial motor vehicle disqualification, the test result must be .044 or greater.

If a subject's test is below .085 and the person is age 21 or under, the driver may be revoked for a .02 violation instead of an OWI revocation.

Do not subtract the margin of error yourself when entering a test result on any form, always place the actual test number on any forms or paperwork.

Testifying on the Accuracy of the Instrument

Peace officers are not expected to provide scientific or technical testimony on the workings of any chemical testing devices. The only real concern is that the officer is certified to administer tests on the instrument and that the officer conducted any procedural aspects of the test as instructed. If a particular officer has more knowledge about the workings of the device, they can answer any questions asked. Also, officers may be asked general questions as to their experience with the devices and any problems they have experienced.

Instrument Malfunctions

If a breath testing instrument malfunctions or indicates some error, the peace officer should ask for a different substance for chemical testing: either a blood or urine test. The driver must consent to this sample or it is considered a refusal, unless the sample was blood, and then the officer should proceed to request the urine specimen, a refusal of which would constitute a chemical test refusal.

Ask the driver to sign again for the alternate substance, either on a new form or on the same form with clear indications of the new substance requested.

If the breath test machine is malfunctioning, often times officers will ask consent of the driver to test on another machine. If the person agrees, this is acceptable and they can be tested on the alternate machine. However, if they refuse, the officer must then ask for a different chemical substance.

Incapable of Consent

Iowa law allows for a chemical test when the driver is dead, unconscious, or otherwise in a condition rendering the person incapable of consent or refusal. This provision in the law is most often utilized following a motor vehicle accident when a driver is taken to a medical treatment facility.

If the peace officer believes the person to be in this condition, the officer should consult with a physician.

The peace officer can forego the written request for a specimen (reading the implied consent advisory and obtaining a verbal consent or refusal) in cases where a physician certifies the person to be either dead, unconscious, or otherwise incapable. A specific form should be

used to obtain the doctor's certification (See Item C in Attachments and Forms)

While it is best to receive the written certification by the physician prior to removal of the specimen, it is possible to receive oral certification, as long as the form is completed within a reasonable period of time. If the officer forgets to have the written certification done prior to withdrawal of the specimen, it should be completed as soon as the oversight is discovered.

The decision on whether or not to take a test is always that of the driver if they are capable. In cases where the person is deemed incapable, the decision is that of the physician. A spouse, parent, or attorney cannot make a decision for an incapable driver. If they are attempting to refuse the test for the driver, they should be ignored and the physician's certification used as the basis to withdraw the sample.

A driver may be awake or conscious and still be deemed incapable. Ask the doctor for a medical opinion and if the doctor believes the person to be in a condition rendering them incapable, then have the doctor certify this on the form.

The doctor may ask for either blood or urine to be taken. The appropriate hospital personnel must draw the sample of blood. Make sure that the person drawing the blood is qualified to do so and then properly seal, mark, and process the blood or urine with the DCI laboratory.

Urine Testing Procedure

Urine collection procedures are outlined in Iowa Administrative Code section 661-7.3 and 4(321J) and are as follows:

“As soon as practicable after arrest, the subject should provide the sample by being required to urinate into a bottle, cup, or other suitable container which is clean, dry, and free from any visible contamination.

It is not necessary that the bladder be completely emptied. Later samples may be taken if desired, but are not necessary.

The collection shall be made in the presence of a peace officer or other reliable person under the supervision of a peace officer. The peace officer or other person in the presence of the subject shall be of the same gender as the subject.

Upon collection, a peace officer shall cause the sample to be sealed within a clean, dry container. The container shall be free of visible contamination. If the blood alcohol kit of any manufacturer is utilized for the preservation of a urine sample, the anticoagulant and antibacterial substances in that kit do not constitute visible contamination. The peace officer shall cause a tag or other device to be attached to the container showing the date and time the sample was collected and identifying the arresting officer, the subject, the collecting officer and the person present during the collection of the sample, if other than the collecting officer.

Any sample of urine or blood may be submitted to the department's criminalistics laboratory or other appropriate laboratory via ordinary mail or hand deliver."

Blood Testing Procedure

Blood test procedures are similar to urine requirements and are found in Iowa Code section 321J.11.

"Only a licensed physician, licensed physician assistant as defined in section 148C.1, medical technologist, or registered nurse, acting at the request of a peace officer, may withdraw a specimen of blood for the purpose of determining the alcohol concentration or the presence of a controlled substance or other drug. Only new equipment kept under strictly sanitary and sterile conditions shall be used for drawing blood."

As with urine, the blood test kit should be properly sealed, and marked with a tag or other device listing the date and time the sample was collected, the officer's name, the driver's name, and the collecting person's name. Blood test can also be hand delivered or mailed to the DCI laboratory for testing, or may be tested at another appropriate laboratory.

Independent Chemical Tests

A person may have an independent chemical test or tests administered at the person's own expense in addition to any administered at the direction of the peace officer. The failure or inability of the person to obtain an independent chemical test or tests does not preclude the admission of the evidence of the results of the test or tests administered by the peace officer in an

administrative hearing.

The person cannot demand the independent test be done before the officer's requested test or that the State pay for the test, or place any other type of condition upon the taking of the chemical test which the peace officer requests. The person is not entitled to an independent chemical test until they have consented and provided the test requested by the peace officer. Any independent tests shall be done at the expense of the driver.

If a driver is insisting on an independent test or wants a test other than the type the peace officer is requesting, the officer should make it clear that the person may have their test taken as an independent test after they submit to the test the officer is requesting. The officer should make it clear that if they refuse to take the test being requested, they will be revoked for a test refusal.

A peace officer is not required to inform the person of their right to an independent test. However, a peace officer must afford a person a reasonable opportunity to obtain an independent test when requested, and the officer may not frustrate a person's attempt to make arrangement for such a test. Whether the officer's response to a request is reasonable or not is determined on a case by case basis.

SUMMARY:

1. The choice of the chemical test is that of the peace officer. The driver cannot place any conditions on the taking of the test nor can the driver select the test, except for refusing a blood test which will require the officer to offer another type of test.
2. The request for the chemical test must be made within two hours of any PBT, PBT refusal, or OWI arrest unless the driver was involved in an accident resulting in personal injury or death and there is no PBT, PBT refusal, or arrest for OWI..
3. Always check the test instrument printouts to ensure proper readings, if there is a problem or the instrument malfunctions, request a different test.
4. If the driver is incapable of consent, have a physician certify the proper form (See Item C in Attachments and Forms).

CHEMICAL TEST REFUSAL

Iowa law provides that a refusal to submit to a chemical test of urine or breath is deemed a refusal to submit to chemical testing. However, a refusal to submit to a chemical test for blood is not deemed to be a refusal to submit. In that case, the peace officer shall determine which one of the other two substances shall be tested and shall offer that test. A refusal of either of the other two substances is deemed a refusal to submit to chemical testing and the person's license should then be revoked.

A person can indicate they consent to take the test but still be considered to have refused if the driver becomes combative and resistive. For instance, the Court has held that a motorist who originally consented but then threw the form at the officer and said, "kiss my ass" was considered to have refused.

In cases involving death or "injury reasonably likely to cause death" where a driver refuses to provide a specimen for testing, the refusal can be overcome by a search warrant.

Refusing to sign the implied consent form regarding consenting or refusing the chemical test is not considered a refusal to submit to chemical testing. If a driver refuses to sign the form, ask them if they are consenting or refusing to take the test. A driver may refuse to sign the form but still consent to the testing. It is the driver's verbal consent or refusal that is binding.

As indicated earlier, the driver cannot place conditions on the taking of the test. They must give an unequivocal consent to the test or it may be considered a refusal.

We recommend that you warn the driver that you will be considering their actions a refusal if they do not agree to take the test. This gives them one final opportunity to consent.

SUMMARY:

1. A refusal to sign the form is not a refusal to take the chemical test.
2. If the person will not consent to the test, it is considered a refusal. Any response other than an unequivocal consent to take the test may be considered a refusal.
3. A driver cannot be revoked for a blood test refusal. Always offer either urine or breath if

the person refuses blood.

SERVICE OF NOTICE OF REVOCATION

In order for a revocation to become effective, it must be served upon the driver. Iowa law allows service of the revocation in two ways: personal service by the peace officer who requested the chemical test, or service by the DOT's Office of Drivers Services.

In most breath test result and refusal cases, a revocation may be served immediately by the peace officer. The officer must physically hand the driver the form and tell them the revocation period. This action constitutes service. The forms may then be placed with the person's belongings if they are being incarcerated. If the peace officer is certifying the form they must physically serve the notice.

Other forms must be served along with the revocation. These include forms for a temporary restricted license, an explanation of Iowa Code Chapter 321J, and the driver's rights under that section, which includes information on requesting an administrative hearing.

If the peace officer serves the notice on the driver, the officer should take any Iowa license or permit in the driver's possession and issue a temporary license valid for ten days. Do not confiscate out of state driver's licenses. The driver may continue to drive on that temporary permit for the ten day period. The revocation will then take place unless the driver asks for a hearing. If a request for a hearing is made, the driver will be issued an order which stays (or delays) the revocation pending the outcome of the administrative hearing. However, Iowa law does not authorize stay orders for zero tolerance/.02 violations or for disqualifications of commercial motor vehicles. While these drivers are entitled to a hearing, they are not permitted to drive after the ten-day period.

The last line on the implied consent form asks the peace officer to "certify under penalty of perjury that the above is true and correct." The peace officer who made the request for the chemical test should be the peace officer who signs this line. That officer should also be the officer who serves any immediate notice of revocation. In cases where a sample is being tested by the DCI and the results are pending, the officer who made the request should be the officer who certifies the form after the results become available. If service of the notice is not possible in these or other instances, do not fill-in the section regarding the personal service of the notice of revocation, but rather, send the form to the DOT's Office of Driver's Services and they will handle the service of the notice of revocation.

SUMMARY:

1. After the chemical test, read the notice of revocation to the driver and hand them the actual revocation form.
2. If unable to personally serve the driver, send the form to the DOT's Office of Driver's Services and they will serve the driver.

ASSISTANCE OF COUNSEL/RIGHTS UNDER IOWA CODE SECTION 804.20

Iowa Code section 804.20 creates a statutory right to consult with an attorney or a family member or both after arrest and before submitting or refusing the chemical test. More implied consent cases are lost because of a violation of this statute than for any other reason.

This right includes a right to consult regarding whether to take a chemical test and is triggered by a defendant's request.

The right attaches after the person is placed under arrest. Field sobriety tests or PBT's do not constitute an arrest and drivers have no right to make telephone calls prior to arrest. However, if a person requests counsel or a phone call at any time, make such available as soon as practical after arrival at the place of detention and before requiring the person to consent or refuse the chemical test.

If a particular attorney cannot be reached, ask the person if there is anyone else they wish to call. This blanket offer to contact someone else helps assure that the driver was given every opportunity to contact someone before deciding to consent or refuse.

Memorialize this information in your reports to ensure a record is made of the officer's attempts at assisting the driver in securing a telephone call. It is also advisable to write into report that no telephone calls were requested. This can be of assistance at a later time, when the driver may claim they asked for calls and were denied the use of the telephone. If you have written into your report that the driver at no time requested any calls, it can be very helpful in refuting their argument.

The decision on whether or not to take the test is solely the driver's. If an attorney or family member speaks to an officer and tells him the person will take or refuse the test, the officer must still ask the person and do whatever the person wants, regardless of the driver's age.

The officer is not required to tell the person of their right to consult with an attorney or family member. However, do not tell the driver that no such right exists or prevent the driver from contacting such persons if a request to make the call is made.

The driver must be given a reasonable opportunity to consult with an attorney. What is reasonable is determined by the judge on a case by case basis. However, an officer should not unreasonably cut off a person's attempts to consult with counsel.

The officer must act reasonably when a request is made, and this may include allowing more than one phone conversation with an attorney or family member or both, as long as the additional conversations do not place in jeopardy the two-hour period for requesting a chemical test.

There are many court cases which provide guidance on the issue of telephone calls. In one such case, the defendant spoke with an attorney who said he would check into the case and call back. The officer refused to wait and deemed the defendant to have refused testing. The attorney called back within ten minutes. One hour remained in the two hour period. The court deemed this a denial of the right to counsel.

However, there is no right to repeated conversations when they might jeopardize the two-hour period. In another case, after a twenty minute telephone conversation, defendant insisted on speaking to his attorney in person. The attorney was forty miles away and the officer would not wait. The court found that this was not a denial of his right to counsel.

How long an officer waits on allowing telephone calls is officer discretion based upon the individual situation. Use your best judgement but we recommend you err on the side of more calls or more time to prevent legal problems later.

Procedurally, the peace officer can place the call if the person is impaired. The driver does not have the right to place the call, although the officer may allow them to dial the numbers if they choose.

In one court case where the defendant supplied the name and number of an attorney but objected to the peace officer placing the call, the court found it was not a violation of defendant's right to counsel for only the officer to place the call.

The right for telephone calls exists up to the point of actually providing or refusing the specimen. If the driver consents to the test and then asks to contact a lawyer, the officer must still provide them the call.

There is no requirement that an officer allow a driver to call anyone other than an attorney or family member. However, if the person requests to call someone other than an attorney or family member, the officer may not simply refuse the request without explanation. In those instances, the officer is required to advise the driver for what purposes and to whom a call is permitted under section 804.20. If the individual still wishes to place a call to a person permitted under the statute, the officer must allow the call.

If the person speaks to a lawyer and then wants to contact a family member, they must be allowed that call as well. The law states the driver has a right to contact an attorney, family member, or both.

In some instances the parties may attempt to delay the test by continuing to talk for an extended period of time. It is important for the peace officer to provide the driver a reasonable opportunity for advice. While there is no set time frame for how long the calls can last, the peace officer may want to interrupt the driver and indicate that a decision is needed and indicate that they have five or ten more minutes to decide. We recommend the officer give the driver several such warnings before stopping the contact, and then memorialize each of these warnings by noting the time and the content of the discussion.

In addition to telephone calls, the driver also has a right to see and consult privately at the law center with their attorney. This must be permitted but cannot interfere with the taking of the test within the two-hour period.

If the driver indicates their attorney wishes to come to the law center, the officer should inquire as to how long it will take the attorney to arrive. If the time frame is short enough and acceptable to the officer, the officer may inform the driver that the decision can be delayed based upon the agreed-upon time frame for the attorneys arrival. If the time frame is unacceptably long, allow the driver and attorney to continue the current conversation. The attorney can be advised that if they cannot arrive within that time frame, they should contact the department.

Subjects do not have a right to contact anyone prior to an arrest for OWI. Officer are not required to allow drivers to use cellular phones while at the scene. The law states the person has a right to make telephone calls once they arrive at the place of detention but the officer may allow the calls at their discretion.

Sometimes officers attempt to make arrangements with the driver for the vehicle to be removed without having it towed. Some defense attorneys will argue that if the driver indicates a family member or other person can take possession of the vehicle, that this constitutes an invocation of the driver's right to an attorney. Be sure that if the driver indicates they want to contact someone, they are allowed to make telephone calls.

Miranda Warning

Miranda warning are not required prior to implied consent.

To be admissible in court, a defendant's statements must be made voluntarily, that is, without coercion. A warning informing a suspect of his constitutional rights is required when the suspect is in custody and before interrogation.

However, Miranda warnings are not required prior to general on-the-scene questioning of suspects following traffic stops as they do not constitute "custodial interrogation." Nor is it a violation of a person's right to counsel under Miranda to ask a person arrested for operating while intoxicated to perform field sobriety test.

Regardless of whether a person is in custody, voluntary statements are admissible. In addition, officers are allowed to obtain basic identifying information without administering Miranda warnings.

SUMMARY:

1. Every driver has a right to speak to an attorney, a family member or both before taking or refusing a chemical test.
2. A peace officer does not need to inform the driver of such a right, but when the driver raises such a right, the peace officer cannot refuse the contact.
3. Always make a record of telephone calls and times.
4. Always note in your report when no calls are requested to memorialize no such requests were made.
5. The decision on whether or not to submit to chemical testing is always that of the driver, not the attorney or family member.
6. An arrestee does not have two hours to make telephone calls or to decide on taking a test. The peace officer must give the driver a "reasonable opportunity" to make such contact.

ZERO TOLERANCE/ALCOHOL CONCENTRATIONS BETWEEN .02-.08 FOR UNDER AGE 21 DRIVERS

Approximately 2,000 drivers under the age of 21 have their licenses revoked each year in Iowa for operating a motor vehicle with an alcohol concentration between .02-.08.

Young people are a special target for traffic safety. While being less experienced drivers many are also beginning to experiment with alcohol or other drugs. The results can be tragic. The under age 25 group represents just 16% of licensed drivers in Iowa but account for nearly 30% of all alcohol-related fatalities and injuries. Over the next 10 years, statistics indicate that approximately 400 persons under the age of 25 will die in Iowa due to alcohol-related accidents.

Iowa Code section 312J.2A provides for administrative revocation for persons under age 21 who operate a motor vehicle with an alcohol concentration greater than .02 but less than .08. There is no criminal charge or criminal history for .02 revocations.

Iowa law provides the license will be revoked for sixty days for a first test failure and ninety days for all subsequent .02 failures. If the under age 21 driver refuses testing, the revocations are the same as for any age driver: one year for a first offense, two years for all subsequent offenses.

Revocations for both .02 and .08 count as prior revocations when determining whether the offense is a first or subsequent revocation under the chapter.

Peace officers who encounter an under age 21 driver they believe may have been drinking should treat that driver like they are of legal age because you can not be sure at what level they will ultimately test. Always make note of the observations and conduct the standardized field sobriety tests and PBT.

A peace officer still needs reasonable grounds for under age 21 drivers. Typically this can be arrived at with less information than a normal OWI. The mere odor of alcohol or an admission by the under age driver that they consumed alcohol can be a sufficient basis to ask for a chemical test.

However, it is important to investigate under age drivers in the same manner as others because the peace officer cannot know whether the person will submit to a chemical test or, if they do consent, what the test result will read.

There have been some instances where an under age driver submits to a PBT which is under .08, but when they submit to a chemical test, the result is over the legal limit. At that point, the driver should be revoked for a .08 violation and can be charged with OWI. However, if the peace officer has neglected to administer standardized testing and gather other evidence, the case could be weakened.

Always complete a report on under age 21 drivers which can be used as a basis for later testimony.

Typically with an under 21 age driver who submits to a PBT between .02-.08, the driver will not be arrested at the scene. Because the PBT is the only statutory occurrence utilized to request the chemical test (remember the seven possible options in the section on Arrests/Statutory Requirements), it is imperative that a properly completed PBT log exist. Make sure your department's PBT units are calibrated at least once per month and that all of the necessary information is recorded. (See the form in section B in Attachments and Forms)

SUMMARY:

1. Always treat the zero tolerance driver as if they may have a BAC of .08 or more.
2. Previous .02 revocations count in enhancing any other revocation.
3. Make sure PBT's are properly calibrated and logged.

SPECIAL REQUIREMENTS FOR JUVENILES

A juvenile is a person under the age of 18. Iowa law provides certain requirements be met for persons under the age of 18 who are arrested or taken into custody by a peace officer.

Iowa Code section 232.11 provides that a child shall have the right to be represented by counsel from the time the person is taken into custody for any alleged delinquent act that constitutes a serious or aggravated misdemeanor or felony.

When taking a child into custody or after an arrest, the peace officer must make an attempt to contact the child's parent, guardian, or custodian and inform the child about their right to speak to an attorney.

While peace officers are not required to advise adults of their rights to consultation with an attorney and/or family member prior to testing, a child must be told about their right to be represented. To best comply with this law, we recommend that before any implied consent process, the peace officer read the Miranda warning to the child and attempt to contact an adult responsible for the child.

If the child wishes to contact an attorney, they must be allowed the same rights as an adult. If the parent, guardian, or custodian cannot be reached, the child must still make a decision on whether to consent or refuse the chemical test.

The decision to consent or refuse the chemical test is always the decision of the driver. If a parent says they are not allowing a test, the officer must still ask and get the decision from the juvenile. If the juvenile refuses to make a decision, it should be considered a test refusal. If the parent is insistent on submission to a test, the juvenile must still make the ultimate decision. Parents are not required to sign the request and notice form, only the driver need sign.

Although a zero tolerance violation is not a criminal offense and does not necessitate an arrest, we recommend always contacting the parent, guardian, or custodian and advising the juvenile of their right to counsel, because zero tolerance may still be construed as "taking into custody" and the peace officer can not know what the result of a chemical test may ultimately be: if the result is over the legal limit of .08, an arrest may still be made.

SUMMARY:

1. A peace officer must advise the juvenile of their right to counsel and attempt to contact their parent, guardian, or custodian prior to asking for a chemical test.
2. If such persons are not available, the juvenile must still make a decision.

DRIVERS UNDER THE INFLUENCE OF DRUGS

When a peace officer has reasonable grounds to believe a person has been operating a motor vehicle under the influence of drugs or a combination of alcohol and another drug, implied consent may be invoked.

Developing reasonable grounds for drugs is no different than alcohol - an officer still must have an articulable basis to believe the offense has been committed.

A driver may be using both alcohol and drugs, and therefore, some of the traditional alcohol indicators may be present. Some drivers use drugs only and they may have some of the same types of impairment indicators as well as many which are more exclusive to drug use.

Drug use indicators include the odor of marijuana or the presence of paraphernalia, such as pipes, bongs, one-hitters, clips, rolling papers, baggies, and seeds. Always inquire whether the driver has been using drugs as an admission can be part of the reasonable grounds determination.

Passengers can also provide information about drugs or paraphernalia in the vehicle or about whether the driver has been using drugs. The officer may wish to separate the driver and any passengers to make inquiries.

It is becoming more common for peace officers to have some basic training in the detection of drug-related offenses. Additionally, there are more officers who have become certified as Drug Recognition Experts (DRE).

If you suspect drug use record all of the observations and information which cause the suspicion and contact a DRE for assistance. As these examinations may take some time, be sure to have them completed without interfering with the two-hour period for which a chemical test must be requested. If no DRE is available, proceed with chemical testing.

The peace officer may ask for a chemical breath test if alcohol and drugs are both involved or may ask only for a urine test.

If a chemical breath test is given and the alcohol level is below the legal level and the officer suspects the driver is under the influence of drugs or a combination of alcohol and another drug, then a urine sample may be requested.

Officers have the right to seek urine as the sample to be tested even if breath testing is available. Officer should not ask for a blood test for drug testing purposes, the DCI lab prefers urine tests.

The DOT will revoke a person's operating privileges for any detectable amount of a controlled substance. Drug testing is similar to .02/zero tolerance in that it is not necessary to show impairment, only that the driver has the controlled substance in the sample. Because controlled substances are illegal, having any amount in the body constitutes a basis for revocation.

The DCI Criminalistics Laboratory's testing procedure for urine is to conduct a test for alcohol along with an "initial screen" for the presence of drugs. The first report issued will include an alcohol test result and the results of the initial screen for drugs. This report will state that a final toxicology report will follow to confirm the drug screen. Make sure to wait until this final report is issued to fill-out the revocation paperwork which is sent to the Office of Driver's Services. (Samples of these reports are included as Item D in Attachments and Forms)

SUMMARY:

1. A peace officer must be able to articulate what reasonable grounds existed to believe the operator was under the influence of drugs.
2. If available, utilize a drug recognition expert to examine the driver.
3. Before filling in the bottom of the implied consent form, wait for the DCI laboratories final toxicology report.

COMMERCIAL MOTOR VEHICLE OPERATORS

Operators of commercial motor vehicles should be read the implied consent advisory (see the above section “Implied Consent Advisory”) as well as the “Additional Implied Consent Advisory For Commercial Motor Vehicle Operators Only”, which states:

“If you are operating a commercial motor vehicle and you submit to chemical testing and the test results indicate an alcohol concentration of four hundredths or more OR if you refuse to submit to chemical testing, you shall be disqualified from operating a commercial motor vehicle for one year.

The disqualification from operating a commercial motor vehicle shall be for three years instead of one year if you are operating a commercial motor vehicle transporting hazardous material of a type or quantity requiring vehicle placarding.

The disqualification shall be for life instead of the periods above if you previously committed any of the following acts or offenses in any state or foreign jurisdiction while operating a commercial motor vehicle after June 30, 1990: (a) operating while under the influence of an alcoholic beverage or other drug or controlled substance or a combination of such substances, (b) operating with an alcoholic concentration of four hundredths or more; (c) refusal to submit to required chemical testing; (d) failure to stop and render aid at the scene of an accident involving your vehicle; (e) a felony or aggravated misdemeanor. The lifetime disqualification may be reduced to 10 years as provided by Federal law.”

With CMV operators, the peace officer must be able to articulate a reasonable basis that the statute has been violated. Officers should always treat suspected .04 offenders the same as regular OWI cases, collecting all the evidence and administering all the field sobriety tests, because the officer cannot know what the test result will ultimately be or if the person will refuse.

SUMMARY:

1. In addition to the standard implied consent advisory, the peace officer must read the “Additional Implied Consent Advisory For Commercial Motor Vehicle Operators Only”

before requesting a chemical test.

2. A peace officer must have a reasonable basis to believe the driver is over .04 BAC.

ATTACHMENTS AND FORMS

- A. Request and Notice Form and Materials
- B. PBT (Preliminary Breath Test) Calibration Log
- C. Physician's Certification For Driver Dead, Unconscious,
or Otherwise Incapable of Consent or Refusal
- D. Sample DCI Drug Test Forms
- E. Operational Manual For Data Master cdm Chemical Breath Testing Instrument
- F. Standardized Field Sobriety Test Instructions from ILEA.

A. REQUEST AND NOTICE FORM AND MATERIALS

B. PBT (PRELIMINARY BREATH TEST) CALIBRATION LOG

C. PHYSICIAN'S CERTIFICATION FOR DRIVER DEAD, UNCONSCIOUS, OR
OTHERWISE INCAPABLE OF CONSENT OR REFUSAL

D. SAMPLE DCI DRUG TEST FORMS

E. OPERATIONAL MANUAL FOR DATA MASTER CDM
CHEMICAL BREATH TESTING INSTRUMENT

F. STANDARDIZED FIELD SOBRIETY TEST INSTRUCTIONS
FROM IOWA LAW ENFORCEMENT ACADEMY